clutched at the hand of brotherly friendship shown by the co-respondent who was her son's mentor, to prevent herself from sinking into the morass of complete despair. I can only advise the parties now to put their marriage on a proper footing, if they can. I feel that they can do this if only they make an attempt in the interests of the 2 children who are at an age when they need the care and solicitude which only parents can show.

The petition is dismissed with costs. The children will remain in their mother's custody. Liberty to apply.

Petition dismissed.

Solicitors: *David Marshall*; *Braddell Bros.*; *Boswell Hsieh & Lim.*

KHOR EWE SUAN & ANOR v. PUBLIC PROSECUTOR

[A.Cr.J. (Hepworth J.) April 24, 1964]

[Alor Star — Kedah Criminal Appeal No. 52 of 1964]

Criminal Procedure — Bail bond — Forfeiture of bond — Failure to take evidence on oath — Whether failure of jurisdiction — Criminal Procedure Code (Cap. 6), ss. 404(i) & 405 — Courts of Judicature Act., 1964, s. 26.

The appellants in this case alleged that their cash bail of $1,000 which they had deposited had been wrongly forfeited under section 404(i) of the Criminal Procedure Code. They appealed on the ground that there was failure to take evidence on oath as to the forfeiture of the bond and this occasioned a failure of jurisdiction. Consequently the appellants had not been given an opportunity of cross-examining the witness on whose evidence the forfeiture was held to be established.

Held: as the court in this case had not drawn up proceedings against the principal and the sureties evidence should have been led producing the actual bail bond and stating that the bailors were the persons who had entered into the bond. They should then have been given an opportunity to cross-examine the witness who produced the bail bond and to show cause why their recognizance should not be forfeited. They should have been invited to go into the witness box and state their case, if they so wished, calling any further evidence which they required.

Statement in *Mallal's* Criminal Procedure, 4th edn. p. 557 quoted with approval.

Cases referred to:—

(1) *Khor Swee Khim* v. *Public Prosecutor* [1953] M.L.J. 117.

(2) *Koay Ban Siew* v. *Public Prosecutor* [1948] M.L.J. 54.

CRIMINAL APPEAL.

Hwang Yang Choo for the appellants.

Wan Ismail bin Wan Mohamed Salleh (Deputy Public Prosecutor) for the respondent.

Hepworth J.: This was an appeal by two bailors that their cash bail of $1,000 which they had deposited had been wrongly forfeited by the learned president under section 404(i) of the Criminal Procedure Code.

The grounds of appeal were that the learned president had failed to have taken evidence on oath as to the forfeiture of the bond and this occasioned a failure of jurisdiction. The appellants had consequently not been given an opportunity of cross-examining the witness or witnesses on whose evidence the forfeiture was held to be established.

Section 404(i) of the Criminal Procedure Code reads as follows:—

"404(i) Whenever it is proved to the satisfaction of the court by which a bond under this code has been taken,

or when the bond is for appearance before a court, whenever it is proved to the satisfaction of such court,

that such bond has been forfeited, the court shall record the grounds of such proof and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid."

In *Mallal's* Criminal Procedure, 4th edition, when considering the comparable provisions of section 416 of the Singapore Criminal Procedure Code the author states as follows:—

"*Whenever it is Proved.* — The words 'whenever it is proved' imply that evidence on oath should be taken by the magistrate as to the forfeiture of the bond, before calling on the party bound thereby to pay the penalty or show cause why he should not do so. The use of words 'whenever it is proved' makes it necessary that the evidence should be taken and recorded by the magistrate in the usual way in order to afford a foundation for his jurisdiction to call on the party to show cause and to declare his recognizance forfeited. When this is not done, there is failure of jurisdiction, and the defect cannot be cured by silence, neglect or waiver, positive or negative, of the party interested. See *Re Birbhan*, 11 B. H. C. R. 170.

The proceeding to realize a penalty is in the nature of civil proceedings, and the person against whom it is held, is competent to give evidence on oath in his own behalf, and also entitled to call evidence. *Re Buksh*, 15 W.R. 87. There must be a regular judicial trial and legal inquiry before the punishment can be inflicted. *Re Chowdhry*, 12 W.R. 54. The evidence on which the court is satisfied that the forfeiture has been incurred and that the person bound by the bond should be called upon to pay or to show cause, may be taken in the absence of such person, but the final order making him liable cannot be made without taking evidence in his presence or giving him an opportunity of cross-examining the witnesses on whose evidence the forfeiture is held to be established. *R.* v. *Chowdhury*, I.L.R. 25 Cal. 440. Evidence taken in a different trial cannot be admitted for the purpose of inquiry under this section against the accused. See *Re Chowdhry, supra.* But the judgment in which the person is convicted would be admissible against the principal or the surety.

There is a palpable distinction between bonds which are not, and those which are, for appearance before a court. Proof other than is directly before the court in its own record is required in the former and not in the latter.

Where a court had before it the order for bail, the bail-bond, and the fact that the sureties had not produced the accused, and upon these materials drew up proceedings against the principal and the sureties under

the provisions of this section, held, that there was substantial compliance with subsection (1) of this section and the High Court would not be justified in interfering in revision on the ground that the court had no proof that the bond had been forfeited."

In this case the court had not drawn up proceedings against the principal and the sureties under the section. It seems to me that evidence should have been led producing the actual bail bond and stating that the bailors were the persons who had entered into the bond. They should then have been given an opportunity to cross-examine the witness who produced the bail bond and to show cause why their recognizance should not be forfeited. They should have been invited to go into the witness box and state their case, if they so wished, calling any further evidence which they required. This had not been done.

There is no general right of appeal. Appellate jurisdiction is solely a creation of statute and it extends only as far as the words of the statute necessarily require. (*Khor Swee Khim* v. *Public Prosecutor*) [1]. The appellate criminal jurisdiction of the High Court consists, by virtue of section 26 of the Courts of Judicature Act, 1964, of the hearing of appeals from subordinate courts according to the provisions of the law for the time being in force relating to criminal procedure, that is in the present case the Criminal Procedure Code. Under section 307 a person who has not been a party to the case in the first place has no right of appeal. (*Koay Ban Siew* v. *Public Prosecutor*) [2]. However, by virtue of the provisions of section 405, all orders made under section 404 are appealable to the court of a judge.

Accordingly I quashed the order of the magistrate forfeiting the bond and ordered the case to be remitted to the magistrate for him to hear evidence on oath and come to a decision in compliance with the provisions of section 404(i) of the Criminal Procedure Code.

Order of magistrate quashed.

Case remitted for taking of evidence.

Solicitors: *Pillai, Lim, Lee & Hwang.*

PUBLIC PROSECUTOR v. ZAINI

[ACr.J. (Kulasekaram J.) May 27, 1964]

[Singapore — District Court Criminal Appeal No. 33 of 1964]

Penal Code s. 193 — False evidence — Gravity of offence — Assessment of — Appropriate sentence — Leniency.

Criminal Procedure — Sentence — Previous conviction for similar offence — Enhancement of sentence.

Muslims Ordinance, 1957, s. 61 — Muslim Marriage and Divorce (Amendment) Rules, 1961 — Making false statement to kathi in order to contract second marriage.

In offences under section 193 of the Penal Code and in allied offences, for assessing the gravity of the offence and to decide what would be an appropriate sentence, the trial judge should have, amongst other matters, directed his mind as to why the accused made the false statement, what he sought to achieve by giving the false evidence and to what extent he succeeded by his acts and what harm, if any, he caused to anybody.

In this case the respondent was charged with giving false evidence in proceedings before a kathi, which are deemed to be judicial proceedings within the meaning of Chapter XI of the Penal Code by section 61 of the Muslims Ordinance, 1957. The respondent in his application for marriage had declared before the kathi that he was a bachelor when in fact he was a married man. He pleaded guilty and although he had a previous conviction for similarly giving false evidence to a kathi, he was sentenced to 1 day's imprisonment and a fine of $150. The Public Prosecutor appealed against this sentence on the ground that it was manifestly inadequate.

Held: (1) by deliberately not making a true disclosure of the facts before the kathi the respondent had achieved what precisely the law sought to prevent. In such circumstances to impose a lenient punishment would clearly bring the law into contempt and encouarge others to likewise flout the law;

(2) in the circumstances of this case and seeing that the respondent had had a previous conviction for a similar offence where he had been treated lightly but appeared to have not profited by it, the sentence imposed on him was manifestly inadequate.

CRIMINAL APPEAL.

Ahmad Ibrahim, State Advocate-General, in person.

Respondent in person.

Cur. Adv. Vult.

Kulasekaram J.: In this case the respondent was charged with giving false evidence before a kathi when he applied to get married. The respondent stated to the kathi in a judicial proceeding that he was a bachelor when in fact he was a married man. He pleaded guilty to an offence under section 193 of the Penal Code.

The learned district judge imposed a sentence of 1 day's imprisonment and a fine of $150 and the Public Prosecutor now appeals against this sentence on the ground that the sentence is manifestly inadequate.

The learned district judge in imposing this sentence says that the High Court has consistently imposed lenient sentences in similar cases. He further says that it appeared to him that none of the respondent's two wives had been adversely affected by this offence. There is nothing in the narrative of the facts to justify the latter conclusion which the learned district judge has drawn. What is more the learned district judge only directed his mind to these two facts and appears to have considered nothing else.

In my view, in offences under section 193 of the Penal Code and in allied offences, for assessing the gravity of the offence and to decide what would be an appropriate sentence, the learned